2015 IL App (1st) 132206-U

FIRST DIVISION
May 26, 2015

No. 1-13-2206

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 5863
	)	
FABIAN TORRES,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Trial court did not abuse its discretion where it admitted evidence of defendant's other acts to prove intent where the previous incidents were generally similar to the charged crime and any error was harmless where other evidence of intent was overwhelming. The State proved beyond a reasonable doubt that defendant intended to commit an act of penetration where he informed victim he wished to have sex with her.

¶ 2 Following a bench trial, defendant Fabian Torres was found guilty of indecent solicitation of a child and sentenced to six years' incarceration. On appeal, defendant contends that the trial court erred in admitting testimony regarding defendant's prior acts to prove his intent in the charged offense. He also contends that the State failed to prove beyond a reasonable doubt that he intended to commit an act of sexual penetration. We affirm.

¶ 3 Defendant was charged with a single count of indecent solicitation of a child. The charge stemmed from an encounter between defendant and N.V., a 12-year-old girl, as she walked home from a friend's house on March 16, 2011.

¶ 4 Prior to trial, the State filed a motion to admit the testimony of seven witnesses regarding four separate incidents as evidence of other crimes to prove defendant's intent. Defendant filed a written response. Following a hearing on the motion, the trial court ruled that all of the evidence was admissible to show defendant's intent.

¶ 5 At trial, the State first presented the testimony of three witnesses: Arlene F., Esmeralda P., and Andrea T. Each of these women testified about separate interactions with defendant prior to March 16, 2011.

¶ 6 Arlene testified that she was taking her son out of her car on the afternoon of April 11, 2010. Defendant walked up behind Arlene, "grabbed [her] butt and rubbed up and down." She pushed him away and threatened to call the police. He responded that he did not care and walked

away.

¶ 7 Esmeralda testified that defendant approached her in her garage on the evening of June 1, 2009. He "got really close" to Esmeralda, grabbed her hand, and pulled her towards him. He told her that she "was pretty and he wanted to have sex with [her]." Esmeralda kicked defendant and he walked away.

¶ 8 Andrea testified that she was riding on an "L" train on the morning of June 24, 2008. Defendant, the only other person on the train car, attempted to sit directly next to Andrea. After she blocked the seat with her luggage, he sat down directly across from Andrea, facing her. He began making hissing noises to get her attention. When she looked up, defendant "had his zipper down, his genitals out, and was massaging his genitals." Andrea yelled and moved to the other end of the train car.

¶ 9 Following the testimony on defendant's other acts, the State called N.V.'s friend, J.E. She testified that she was riding her bike next to N.V. as N.V. walked home on March 16, 2011. Defendant walked up to N.V. and "asked her to have sex with him in Spanish." While J.E. spoke "very little" Spanish, she understood what defendant said. As he spoke, defendant placed a dollar in N.V.'s pocket. He then grabbed N.V. and began to pull her towards him. J.E. jumped off her bike, punched defendant, knocked him to the ground, and began to kick him. Once defendant was on the ground, N.V. called the police. Defendant stood up, took his belt off, and started swinging it at J.E. before walking away.

¶ 10 N.V. testified consistently with J.E.'s testimony. When asked about defendant's comments to her, N.V. stated: "He told me in a way that he wanted to have sex with me" and "I don't exactly remember, but I know it was something about having sex with me."

¶ 11 Following the State's case, defendant rested without presenting evidence.

¶ 12 The trial court found all the witnesses to be "very credible." It also stated:

> "[T]he court finds that [N.V.]'s understanding of what the defendant said to her that day was that he wanted to have sex with her, although she could not recall now, she said, the exact words. And sex means, as we all know, penetration, however slight, between the sex organs of a person, one person to another, to a male's penis to a female's vagina."

The court found defendant guilty of indecent solicitation of a child and sentenced him to six years' incarceration. Defendant appeals.

¶ 13 On appeal, defendant argues two primary contentions: (1) the admission of other acts evidence was improper, and (2) the State failed to prove beyond a reasonable doubt that defendant intended to commit an act of penetration.[1] We address these contentions in turn.

¶ 14 First, defendant contends that the trial court erred in admitting the testimony of Arlene, Esmeralda, and Andrea as evidence of other acts to prove his intent in the current case. Specifically, he argues that the events evidenced by the other acts were substantially dissimilar

[1] In his opening brief, defendant also argued that the State failed to prove beyond a reasonable doubt that N.V. was 12 years old or younger. We do not address this claim, however, because defendant withdrew this contention in his reply brief.

from his interaction with N.V. He notes that the other acts all took place at different times, in different locations, and involved victims significantly older than N.V. He further notes that the actions described by Arlene and Andrea differ considerably from those described by N.V. and J.E. The State responds that the other acts were "very similar" to defendant's interaction with N.V. and that the evidence's probative value was not substantially outweighed by its prejudicial effect.

¶ 15 While evidence of other acts is typically inadmissible to prove a defendant's propensity to commit a crime, it is admissible if relevant for any other purpose. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Particularly, evidence of a defendant's relevant other acts is admissible to prove his or her intent. *Id.* at 136. Such evidence is relevant if it bears "some threshold similarity to the crime charged." *People v. Donoho*, 204 Ill. 2d 159, 184 (2003), quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983). Where the State presents other acts evidence to prove intent, "mere general areas of similarity will suffice." *People v. Illgen*, 145 Ill. 2d 353, 373 (1991); see also *Donoho*, 204 Ill. 2d at 184. Even where other acts are dissimilar from the crime charged, their admission is harmless error unless it causes prejudice to the defendant. See *People v. Nieves*, 193 Ill. 2d 513, 530 (2000). The admission of other acts evidence "rests within the sound discretion of the trial court," and we will not reverse its decision absent an abuse of discretion. *Wilson*, 214 Ill. 2d at 136.

¶ 16 In the present case, the incident involving Esmeralda was clearly similar to the one involving N.V. In both cases, defendant approached a female victim, grabbed her arm or hand,

pulled her closer, told her he wanted to have sex with her, and then walked away. The incident involving Arlene also bears a similarity to N.V.'s incident. Defendant approached Arlene, initiated unsolicited physical contact, and then walked away. While defendant did not say anything sexual to Arlene, his "grop[ing]" of her buttocks was clearly sexual in nature. In all three occurrences, defendant approached a stranger, made physical contact, conveyed a sexual tone through either a statement or physical act, and then walked away when rebuffed. While the timing, location, and age of the victim varied between the three interactions, the other acts do not need to be identical to the charged crime. *Donoho*, 204 Ill. 2d at 185. Given the general areas of similarity between the incidents and the low threshold required when other acts evidence is presented to prove intent, we find the trial court did not abuse its discretion in finding Arlene's and Esmeralda's incidents were sufficiently similar to N.V.'s.

¶ 17 The similarities between N.V.'s situation and Andrea's are less pronounced. However, even if we assume, *arguendo*, that the incident involving Andrea was insufficiently similar to the present case, her testimony did not prejudice defendant. The evidence presented at trial overwhelmingly demonstrated defendant's intent to perform an act of penetration. Both N.V. and J.E. testified that defendant explicitly indicated he wanted to have sex with N.V., as we discuss further below. Consequently, we find any potential error by the trial court in admitting Andrea's testimony was harmless.

¶ 18 Defendant also argues that even if the other acts were admissible, the court erred by allowing evidence of the acts to become the focus of the trial. See *People v. Smith*, 406 Ill. App.

3d 747, 755 (2010). He bases this argument on the fact that the State presented the other acts evidence first and that the three women's testimony was roughly equal in length to the State's "two main witnesses." The State responds that the evidence was limited in scope and was not excessive.

¶ 19 Other crimes evidence may not become the primary focus of a trial. *Id.* The primary rationale behind this rule is to ensure that a jury is not tempted to convict a defendant based solely on his prior, unrelated acts. See *id.* at 756.

¶ 20 In the present case, there was no jury to be tempted. See *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 55 (finding that danger of unfair prejudice from other acts evidence is far less in a bench trial). Furthermore, we will not reduce our inquiry to an arithmetic question resolved by counting transcript pages. The State's examinations of Arlene, Esmeralda, and Andrea were focused and efficient. Each witness briefly detailed defendant's act towards her and then explained subsequent identifications of the defendant. Each witness's testimony was neither excessively long, nor gratuitously graphic. Having thoroughly reviewed the record, we find that the other acts evidence did not impermissibly become the focus of defendant's trial. Accordingly, we find that the trial court did not abuse its discretion in allowing Arlene, Esmeralda, and Andrea to testify regarding their interactions with defendant.

¶ 21 Defendant also contends that the State failed to prove beyond a reasonable doubt that defendant intended to perform an act of sexual penetration. He notes that neither N.V. nor J.E. testified to defendant's exact words to N.V. and that J.E. admitted she spoke very little Spanish.

The State responds that it presented sufficient evidence to prove defendant guilty beyond a reasonable doubt.

¶ 22 Due process requires the State to prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of evidence, a reviewing court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); See also *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Where a conviction depends on eyewitness testimony, the reviewing court may find testimony insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 279.

¶ 23 A defendant commits an indecent solicitation of a child as charged when (1) he or she is over 17 years of age and (2) knowingly solicits a child or one believed to be a child (3) to perform an act of sexual penetration or sexual conduct, (4) with the intent to commit an act of *** predatory criminal sexual assault of a child. 720 ILCS 5/11-6(a) (West 2010). Predatory criminal sexual assault of a child occurs when a person over 17 years of age commits an act of sexual penetration and the victim is under 13 years of age. 720 ILCS 5/12-14.1 (West 2010).

Therefore, the State was required to prove beyond a reasonable doubt that defendant intended to perform an act of sexual penetration upon N.V.

¶ 24 J.E. testified that defendant asked N.V. to have sex with him in Spanish, but she was not asked what defendant's exact words in Spanish were. N.V. testified that defendant told her "in a way that he wanted to have sex with me." Clearly, there was direct evidence that defendant intended to perform an act involving sexual penetration with N.V. Defendant argues that we must find reasonable doubt where neither girl testified to the exact words defendant used, yet he cites no authority to support such a proposition. We do not believe that a witness, particularly a child, must relate their testimony with the precise detail as suggested by defendant with use of the term "vaginal intercourse." Each witness clearly explained what defendant stated to N.V. While they did not express his precise word choice, they expressed no doubt or hesitance about the meaning of his communication. The trial court explicitly found the witnesses credible. Taking the evidence in the light most favorable to the prosecution, a rational fact finder could determine beyond a reasonable doubt that defendant intended to commit an act of sexual penetration on N.V., and therefore intended to commit an act of predatory criminal sexual assault of a child, based upon his stated desire "to have sex" with her.

¶ 25 Defendant also argues that the trial court erred when it "essentially took judicial notice" that the word "sex" means penetration between a male's penis and a female's vagina. It is well established that a court may take judicial notice of the meaning of commonly used words. See, *e.g.*, *Smith v. Moran*, 43 Ill. App. 2d 373, 377 (1963). The use of the word "sex" to denote an act

of penetration is ubiquitous in common usage. The trial court could reasonably infer, beyond a reasonable doubt, that when defendant stated that he wished to "have sex" he meant he wished to commit an act of penetration. Defendant's argument on this point is without merit.

¶ 26 For the foregoing reasons we find the trial court did not abuse its discretion when it admitted evidence of other acts by the defendant offered to prove his intent. We also find that the State proved defendant's intent to commit an act of predatory criminal sexual assault of a child beyond a reasonable doubt. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.